Supreme Court of the United States

OCTOBER TERM, 1947

No. 544.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

NATIONAL CITY LINES, INC.,
AMERICAN CITY LINES, INC.,
PACIFIC CITY LINES, INC., *et al.*

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF OF NATIONAL CITY LINES, INC., APPELLEE, AND ALL OTHER APPELLEES.

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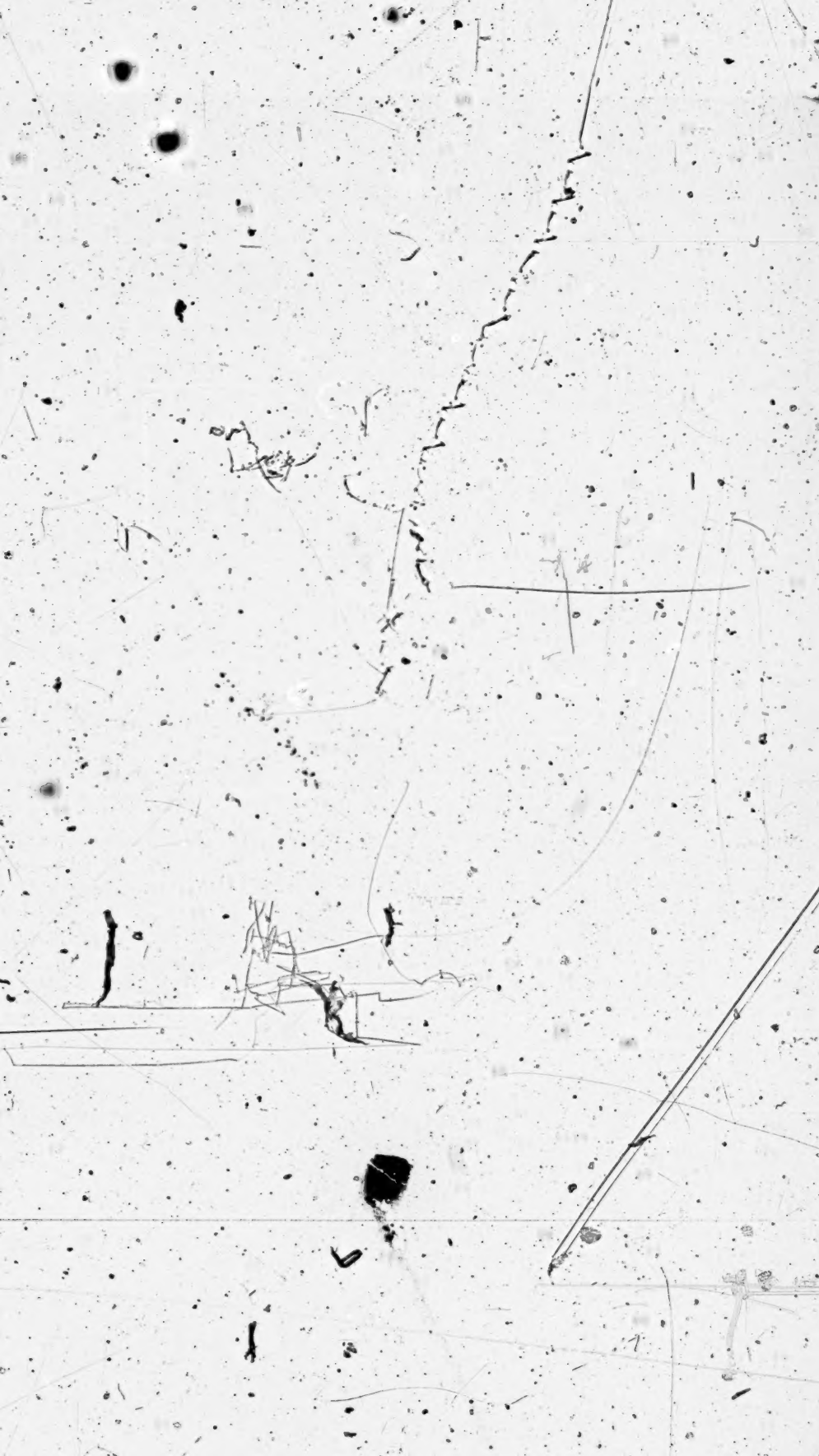

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Opinions Below.

The opinion of the district court (R. 134) is reported in 7 F. R. D. 456. The opinion of the district court in the companion criminal proceeding against appellees (R. 91) is reported in 7 F. R. D. 393.

Jurisdiction.

The decree of the district court was entered on October 15, 1947 (R. 162). Petition for appeal was filed and allowed on December 3, 1947 (R. 190). The jurisdiction of this

Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823, 36 Stat. 1167, 58 Stat. 272; 15 U. S. C. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938; 28 U. S. C. 345). Probable jurisdiction was noted on February 9, 1948 (R. 195).

Questions Presented.

1. Whether the district court, particularly in view of the prior transfer of the companion criminal proceeding to Chicago, abused its discretion in declining jurisdiction of this suit which attacks certain relationships between National, the central defendant whose "business situs" is Chicago, and certain supplier defendants, on the ground that trial in California would be vexatious and oppressive.

2. Whether there was scope for the application of the doctrine of forum *non conveniens* in view of all of the venue provisions of the anti-trust laws, including Section 5 of the Sherman Act and Rule 21(b) of the Federal Rules of Criminal Procedure, and in view of the prior transfer of the criminal proceeding "in the interest of justice".

Statutes and Federal Rule of Criminal Procedure Involved.

The pertinent provisions of Sections 4 and 5 of the Act of July, 1890, 26 Stat. 209, as amended (15 U. S. C. 4 and 5) commonly known as the Sherman Act, are as follows:

SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

Section 12 of the Act of October 15, 1914, 38 Stat. 736, 15 U. S. C. 22, known as the Clayton Act, provides as follows:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

Rule 21(b) of the Federal Rules of Criminal Procedure[1] provides as follows:

> "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

Statement.

On April 9, 1947 a criminal indictment was returned in the District Court for the Southern District of California against National and the eight other corporate defendants named in this equity suit (together with seven individuals, officers of some of the corporate defendants)[2] (R. 76).

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(1) Act of Congress, June 29, 1940 (Public Law No. 675, 76th Cong.) provided that the Supreme Court should undertake the preparation of rules of pleading, practise, and procedure with respect to proceedings in criminal cases in District Courts in the United States. By order of February 3, 1941, 312 U. S. 717, this Court appointed an Advisory Committee of eighteen persons to assist it in this undertaking. The final draft of the rules was submitted to Congress in 1945. Pursuant to order of this Court the rules became effective March 21, 1946.

(2) The appellees, in addition to National City Lines, Inc. (sometimes called National), are American City Lines, Inc. (sometimes called American) which was merged into National in 1946; Pacific City Lines, Inc. (sometimes called Pacific), a subsidiary of National (R. 170); Mack Manufacturing Corporation (sometimes called Mack); Firestone Tire and Rubber Company (sometimes called Firestone); General Motors Corporation (sometimes called General Motors); Phillips Petroleum Company (sometimes called Phillips); Standard Oil Company of California (sometimes called Standard); and Federal Engineering Corporation (sometimes called Federal), an investment subsidiary of Standard. Mack, Firestone,

The complaint in this companion equity suit was filed the next day (R. 1). The transactions complained of and the charges made in the indictment are substantially the same as in the equity complaint.

Of the nine corporate defendants in each proceeding National, the central defendant, was organized in Delaware and has its principal place of business in Chicago, Illinois; American, a Delaware corporation, in Chicago, Illinois; Mack, a Delaware corporation, in New York City, New York; Firestone, an Ohio corporation, in Akron, Ohio; General Motors, a Delaware corporation, in Detroit, Michigan; Phillips, a Delaware corporation, in Bartlesville, Oklahoma; Standard, a Delaware corporation, and Federal, a California corporation, its subsidiary, in San Francisco, California; and Pacific, a Delaware corporation, a subsidiary of National, in Oakland, California. None of the defendants do business or are found in the district where the suit was filed except Standard, General Motors and Firestone (R. 152). The court had no jurisdiction of the other six corporate defendants, including National, and they could be brought before the court only under the provisions of Section 5 of the Sherman Act; in this case the Government failed to obtain any order directing this, merely causing service of the Complaint to be made on these six defendants

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General Motors, Phillips and Standard are sometimes called the supplier defendants.

A motion was made to quash the process on American on the ground that it had been merged into National in July 1946 (R. 66). In view of the dismissal, this motion was denied without prejudice (R. 163). A similar motion in the criminal case was granted by the District Court in Chicago.

The individuals named as defendants in the indictment are E. Roy Fitzgerald, president and director, and Foster G. Beamsley, vice-president and director, of National; H. C. Grossman, assistant secretary of General Motors; Henry C. Judd, treasurer of Standard; L. R. Jackson, vice-president of Firestone; and B. F. Stradley, secretary-treasurer, and A. M. Hughes, vice-president and director of Phillips.

at their principal place of business, service on National being made in Chicago.

The Complaint (R. 1-10) attacks the relationship which has existed between National and the suppliers since 1937, charging that an unlawful concert of action was formed between them on or about January 1, 1937, under which some of the suppliers agreed to furnish funds to National which was to use these funds in purchasing control of operating companies and that the operating companies would purchase portions of their requirements of supplies from the suppliers. This is alleged to have eliminated competition from other suppliers and to have monopolized commerce in these supplies.

Business of National and Proof at Trial.

The facts which must be adduced at trial and the inconvenience and hardship which would result from a trial in Los Angeles are set forth in two affidavits by E. Roy Fitzgerald, president of National (R. 23, 126); affidavits of Joseph H. Thomas and H. H. Hallinger, general counsel and secretary respectively of Firestone (R. 117, 118); and an affidavit of C. W. Haseltine, secretary-treasurer of Mack (R. 15). The Government does not, in reality, controvert the statements in these affidavits but, instead, enlarges on certain interests of National in some operating companies on the west coast, states that the Government may subpoena numbers of witnesses from the west coast, and states other matters respecting the local situation on the west coast, as a justification of the institution of this suit in Los Angeles (affidavit by Jesse R. O'Malley, R. 112).

The allegations of the Complaint, the matters to be tried, the relief prayed for by the Government, the proof which the defendants must produce to meet the allegations

of the Complaint, and the hardship upon and inconvenience to the defendants if trial is had in Los Angeles are all set forth at length in the lower court's findings of fact (R. 151) and opinion (R. 135). These findings are later summarized. It is therefore here necessary only to refer to the facts presented to the court by the above affidavits. The important facts set forth in these affidavits are as follows:

National was organized in 1936, one year prior to the commencement of the challenged course of action, by E. Roy Fitzgerald and his four brothers who transferred to National a few transit properties in the middle west which they had owned or controlled. The brothers became, and always have been, the owners of the largest block of common stock of National and E. Roy Fitzgerald, a resident of Chicago, has been its president and chief executive officer since its formation (R. 25).

National was founded and has been developed on the policy of acquiring interests in transit systems, totally or partially obsolete, and converting them into modern transportation units. It now has an interest in transportation companies in forty-two cities, most of which are in the middle west. None of these local companies is a defendant in either the criminal or equity proceeding. Investigations respecting transportation companies have always been directed from Chicago by National and all important policies and decisions in connection with the acquisition of interests in operating companies have been made by National in Chicago (R. 169).

National has two kinds of interests in operating companies: (1) small companies principally situated in the middle west, in which it has a one hundred per cent stock ownership; and (2) an ownership of less than one hundred per cent in several large companies. These large companies include Los Angeles Transit Lines, The Baltimore Transit

Company, and St. Louis Public Service Company. The small companies situated in the middle west in which National has a one hundred per cent stock interest are the only companies over whose local operations National exercises supervision. The books of account of these companies are kept in Chicago and their purchases of supplies have been arranged in Chicago. All other companies, including all companies on the west coast, are independently operated (R. 25, 130).

This suit is based upon an alleged concert of action between National on the one hand and the suppliers on the other for a period of over ten years from and after 1937, by which the suppliers invested in securities of National and National, or certain operating companies in which it was interested, purchased certain of their requirements of motor buses, tires and tubes, and petroleum products from the suppliers (R. 25). This alleged concert of action between National, which is the alleged "head and front of the offending" (R. 156) and the suppliers was carried on in and about Chicago; the contracts negotiated between National and the suppliers were principally agreed upon in Chicago and either there executed or executed at the offices of the suppliers in Akron, Ohio (Firestone), Pontiac, Michigan (General Motors), New York City (Mack), Bartelsville, Oklahoma (Phillips) and San Francisco (Standard); the stock of National purchased by the suppliers was paid for and delivered in Chicago; the contracts for supplies were made in Chicago; and National has always been managed and run from Chicago (R. 25, 26). In short, the broad concert of action that is charged consists of the relationship between National and suppliers in and from Chicago.

Any inquiry herein will be concerned not with the individual operating companies in California or elsewhere but

with the business and overall management and financial policies of National from 1936 up to the time of trial (R. 27). While the interest of National in these local companies and the acquisition of these interests might in a different suit and under other circumstances be of importance, they have no material bearing on the decision as to the proper venue of this case. These local companies are locally operated and neither the total of their property nor the amount of purchases of supplies by them has any material bearing upon the issue now under discussion. It is not the ownership of these interests, nor the conduct of these local companies, which is the subject of inquiry (R. 128). The trial court recognized the unimportance of the local operating companies, stating that the operating subsidiaries in California were "merely vehicles through which the channelling of petroleum products, tires and other equipment were achieved" (R. 158).

Neither National nor American (which is now merged in National) does or has done any business in the Southern District of California. National does have an interest in two companies (out of about 42 operating companies) which operate in the Southern District of California, Los Angeles Transit Lines and Long Beach City Lines. These companies have always been locally managed and National's position with respect to them has been that of an owner of their securities. The Los Angeles company is alleged to have been purchased in 1945, about eight years after the concert of action is alleged to have been formed, and in this connection it is alleged that Federal supplied some funds to American in return for a portion of its preferred and common stock, and that subsequently Standard sold the Los Angeles company its requirements of petroleum products.

National owns an interest in two other companies whose principal place of business is in northern California, Pacific and the Key System. Neither of these companies has any operations in the Southern District of California. The Key System operates in and about the city of Oakland, and Pacific owns the securities of several operating companies in northern California, Washington and Utah (R. 26, 128). The Key System operates independently. National originally had an interest in Pacific but disposed of it in 1940, repurchasing all of the stock of Pacific in August, 1946. From its formation until April 1940 Pacific was managed and operated from Chicago by National. After April 1940 Pacific was managed and operated from Oakland and the supply contracts between it and the suppliers were prepared and executed by the suppliers at their main offices and executed by Pacific in Oakland. From and after August 1946 when National acquired all of the stock of Pacific, its general policies have been directed from Chicago and the dealings and negotiations between Pacific and the suppliers are carried on principally in Chicago or at the home office of the particular supplier (R. 26, 27, 130).

The assets of the Los Angeles Transit Lines and of the Key System are, in each case, substantial and the purchase of the supplies by them is likewise substantial; but this is true of numbers of local companies situated in other parts of the country in which National has an interest. The Baltimore Transit Company and the St. Louis Public Service Company each have assets substantially greater than those of the Los Angeles company or the Key System. The supplies purchased by all these operating companies are purchased locally. Neither the amount of assets of these local companies nor the amount of the supplies purchased by them have any material bearing on the relationship between National and the suppliers or with the alleged conspiracy (R. 130).

The only officer of National who resided in Los Angeles at the time of the filing of the complaint was W. Ralph Fitzgerald, a vice president of National, who was then president of Los Angeles Transit Lines.

The Government subpoenaed hundreds of documents from National in Chicago, and other companies. These documents concern principally the business of National and the long relationship between National and the suppliers which was carried on from Chicago. They reflect the fact that proof at trial will be based primarily on the testimony of persons residing in and near Chicago and on documents located in Chicago (R. 28).

The trial of this action will probably take at least several weeks. Witnesses at the trial will number at least one hundred. These witnesses will necessarily come largely from Chicago or the area near Chicago (R. 28, 29, 119). The trial in Los Angeles would cause great and unnecessary expense to, and would work a substantial hardship on, all of the defendants (R. 15, 28, 29, 119).

Relief Prayed for in the Complaint.

In addition to asking that the alleged concert of action and contracts be declared unlawful, the complaint prays for the following sweeping relief which, as will later be shown, would involve a detailed and continuous supervision of National's business and policies: that the supplier defendants divest themselves of all Common and Preferred Stocks or other financial interest in National; that National and the operating companies be enjoined from purchasing or otherwise acquiring any buses, tires, tubes and petroleum products, without first advertising for competitive bids, "pursuant to a plan to be made a part of any final order"; that National dispose of its interests in local transportation companies "as is necessary to restore competition and to

dissipate the effects of the unlawful conspiracy"; and that National be enjoined from acquiring any financial interest in any local transportation system without first obtaining the approval of the Court (R. 9).

Transfer of Criminal Prosecution to Chicago.

On July 14, 1947 motions were presented to the district court by all the defendants to transfer the criminal proceeding to the United States District Court for the Northern District of Illinois, Eastern Division (Chicago), pursuant to Rule 21(b) of the Federal Rules of Criminal Procedure. The motions were supported by the detailed affidavit of E. Roy Fitzgerald, President of National (R. 166), and a reply affidavit by him (R. 180) to a counter-affidavit (R. 175). On August 14, 1947 the court rendered a written opinion (R. 91), and entered an order (R. 102), determining that "in the interest of justice" the proceeding should be transferred for trial to Chicago. The defendants have pleaded not guilty and trial of the case in Chicago has been set for October 11, 1948.

The district court in its opinion reviewed the history and reasons for the adoption of Rule 21(b) pointing out that it was intended to remove the injustice of the prior practice "which permitted the Government to hail defendants in a conspiracy case before tribunals far removed from the place of their residence where the conspiracy, if any existed, was hatched" (R. 93). It quoted the views of various persons who had been in Government service and who were members of the Advisory Committee appointed by this Court to draft the rules including the following views of Judge Medalie of the New York Court of Appeals

who had been United States Attorney for the Southern District of New York[3] (R. 93):

> "* * * I feel as you would have with me, if you had preceded me in office—you take these anti-trust cases and other cases involving business operations where indictments are found by the Government—a man is blissfully attending to his business in Chicago, committing this, that or the other crime, or doing this, that or the other good deed, depending on his outlook; and he finds he must go down somewhere in New Mexico, because since his business is nation-wide, you can pick out any jurisdiction in the country and indict him there.
>
> "Now that is pretty shabby business for the great Government of the United States to indulge in. It ought not to be done. So we have another change of venue rule, that if it appears from the indictment or the bill of particulars that the crime has been committed or claimed to have been committed in more than one district, the judge in the district where the indictment has been found can order—and I am sure judges are fair and are not looking for these extra jobs—the trial in the district where it is most convenient that the case be tried.
>
> "If, for example, *a business headquarters are in Chicago, everybody is there, every book and record is there, practically every witness is there on both sides, then try it in Chicago. That is the decent thing to do and accords better with the dignity of our great government that it be done that way, rather than the shabby devices indulged in where we lose our status and our self respect.* Government attorneys cannot, if they appraise themselves properly, afford to engage in that kind of thing, and perhaps it will diminish the abuse, if in fact, it doesn't succeed in its complete abolition." (Emphasis supplied.)

(3) The above views of Judge Medalie were expressed at proceedings of the Institute conducted before the New York University School of Law (Federal Rules of Criminal Procedure, N. Y. Institute, 1946).

After discussing the various criteria appropriate for determining what is "in the interest of justice" and "the facts behind the motion," the district court, in directing the transfer of the proceeding, said (R. 101):

> "We have here a prosecution which would compel the chief defendants (1') to go to a place distant from the location of their business; (2') to employ or bring counsel to a distant city; (3') to bring witnesses from afar; (4') their business headquarters are in another city; (5') most of the records which relate to the transaction on which the indictment is based are there. Under the circumstance, (7') fairness would be absent and (8') the defendants would be put to unjustifiable expense, if we deprived the United States District Court for the Northern District of Illinois, Eastern Division (6) 'of its rightful jurisdiction'.
>
> "I do not question the motive of the Government in instituting the prosecution in this district.
>
> "But I am satisfied that a trial here would impose *unnecessary hardships on the defendants* and entail unjustifiable expense which it is the object of the new rules of criminal procedure, and especially of the rule under discussion, to avoid. Altogether *the facts spell out the vexatiousness and oppressiveness* which the Supreme Court has warned us to eschew in matters of this character." (Emphasis supplied.)

Proceedings, Opinion, and Findings in Equity Suit.

Prior to the decision of the court transferring the criminal proceeding, all the defendants had moved to dismiss this equity suit on the ground that the California court was an inconvenient and inappropriate forum.[4] The mo-

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(4) The main motion was filed by National and Pacific on August 11, 1947 (R. 60), joined in by General Motors (R. 69), and Standard and Federal which relied on the affidavits of National (R. 22). Separate motions were made by Mack which relied on the affidavits of National and filed a separate affidavit (R. 11), Firestone (R. 68) which relied on the affidavits of National and filed two separate affidavits (R. 117), and Phillips (R. 71).

tions were set for hearing on September 15. After the order of the court on August 14 transferring the criminal proceeding, the defendants filed amended and supplemental motions to dismiss the equity suit so as to include the documents and proceedings with respect to the transfer of the criminal proceeding.[5]

The district court declined to take jurisdiction. As to its power, it found that the fact that Section 12 of the Clayton Act is a special venue statute does not prohibit an application of the doctrine of *forum non conveniens* to cases arising under it; that the application of this doctrine to special venue statutes is prohibited only where there was an intent of Congress to confer an absolute right in the plaintiff to choose a venue of his own selection (R. 142); and that in respect to the Clayton Act there was no such intent, particularly because National and the five other defendants could be brought before the court under Section 5 of the Sherman Act only if "the ends of justice" so require (R. 142).

In exercising its discretion, it considered at great length all of the matters urged by the Government and in particular the public nature of the suit. It recognized the need "to balance societal and individual interests" and to maintain the proper equilibrium between private rights and public weal" (R. 144). The order of the court was not, in reality, a dismissal of the action but was in effect a transfer to Chicago. Any conceivable doubt as to this was removed by the stipulation filed by the defendants acknowledging the,

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(5) The main motion was by National and Pacific (R. 73), joined in by General Motors (R. 110) and Standard (R. 111), and supported by appropriate affidavits (R. 74, 123) showing the relationship with the criminal proceeding and the practical hardships which would result from a separate trial of the equity suit in California when the criminal proceeding was pending in Chicago. Separate motions were made by Mack (R. 108), Firestone (R. 106), and Phillips (R. 105). An affidavit in opposition to and a reply affidavit in support of the motion were filed (R. 112, 123).

appropriateness of a trial in Chicago (R. 132). The court stated that the "Government's determination to enforce the statute vigorously will stand unaffected" by the dismissal (R. 145). It had already decided that the facts in the criminal proceeding involved "vexatiousness and oppressiveness" (R. 101). In dismissing the action without prejudice it said (R. 143):

> "That the facts in this case call for the application of the doctrine of *forum non conveniens* is apparent from the nature of the action and from the analysis of the facts presented in the affidavits which I made in the companion criminal prosecution. Practically the same affidavits are before me now. They show that the trial of the case in this district would require the chief defendants to go to places distant from the location of their business, to bring witnesses from afar, to move into this district records which are located in distant cities where their headquarters are maintained, and, in case the decree asked for by the Government is made, it will call for control of foreign corporations over a long period of years by a court which is far removed from the principal places of business of the main defendants."

After careful consideration of the points raised by the defendants and the Government, it declined jurisdiction and, in so doing, it made detailed findings of facts (R. 152-161). These findings so well set forth the facts in their proper perspective that they will be described at length:

1. Five of the defendants—National, American, Pacific, Mack and Phillips—are not doing business and are not to be found in California (R. 144).

2. The "head and front of the offending is National and its subsidiaries American and Pacific" (R. 156).

3. The basic transactions and relationships upon which the complaint is based occurred in Chicago and are the following: National and American made certain agreements with the suppliers under which the suppliers provided money to National or American against their securities, which agreements were negotiated by the different executive officers of the various corporations and were principally agreed upon in Chicago. National and American made certain agreements with the supplier to purchase supplies, which agreements were negotiated by the different executive officers of the various corporations in Chicago and were principally agreed upon in Chicago. National has always been managed from Chicago. All investigations respecting transit properties were directed from Chicago by National and American. All important policies and decisions in connection with the purchase of interests in operating companies were made by National or American in Chicago (R. 155).

4. "The essential matters to be tried from the standpoint of the defendants will be the organization of National in Chicago in 1936; its growth and operation; its relationships and contracts with the supplier defendants and other suppliers, all of which took place or stemmed from Chicago; the financing of National in and from Chicago; and the purchase of and direction and supervision of operating companies, all of which took place in and from Chicago. All these matters involve decisions and determinations made, on the highest management level, by executive officers of National and the supplier defendants in and about Chicago and the home offices of the suppliers. The essential testimony as to all these fundamental policies, decisions, and transactions must come from the executive officers of National and the supplier defendants, all of whom

reside and have their places of business far from this district. The relevant documentary proof must come from the records maintained at the home office of all these companies, all of which are far removed from this district" (R. 155).

5. The trial of the action in California would require the attendance "over a period of months" of some of the key men of National. This would include its president, two vice presidents, its treasurer, its controllers, its secretary and assistant secretary, all of whom have their offices and reside in or about Chicago. It would also require the attendance at the trial of key employees on the accounting staff. *"This would result in a complete dislocation of its business at the place where it can least afford it—at the central place of control."* (Emphasis supplied.) The same condition exists as to the defendants, such as Firestone, General Motors, Mack, and Phillips. Any trial in California would require the chief defendants to go to places distant from the location of their business and to bring witnesses from afar. The defense of the defendant companies will be grounded on the testimony of witnesses who will have to be taken away from head offices (R. 156).

6. It is essential for the protection of the defendants that this case be tried where evidence "may be produced with the least diminution, or impairment, which place is Chicago" (R. 157). The remoteness of Los Angeles would greatly handicap National in obtaining the testimony of witnesses whom it regards as essential in developing the pertinent facts (R. 156).

7. All of the records of National are located in Chicago. Its 34 operating subsidiaries are operated and controlled from Chicago (R. 156).

8. Trial in Los Angeles "would impose unnecessary hardships on the defendants and entail unjustifiable expense which it is in the interest of justice to avoid" (R. 158).

9. The decree sought by the Government would require control and administrative supervision of National over a long period of time. Such detailed and continued supervision could be more efficiently handled by the District Court at the principal office of the defendants rather than by the California Court which is far removed (R. 156, 158).

10. "To try said criminal proceeding in Chicago, Illinois, and also to try this civil equity suit in Los Angeles, California, would cause great hardship and inconvenience, would entail substantial additional expense to the defendants of employing and familiarizing two sets of local defense counsel with the very extensive and complicated facts involved in the two proceedings, one group of attorneys in Chicago to prepare and try the criminal proceeding, and the other group of attorneys in Los Angeles to prepare and try this civil suit. * * * In short, the entire preparation for trial would have to be duplicated. Duplication of efforts would be financially costly to the defendants, as it would require substantially twice the amount of time to be spent in preparing the two actions for trial than would be required if both actions were tried in one jurisdiction. This duplication of effort would also require additional time of the many officers and employees of the defendants familiar with the transactions complained of, which time would have to be taken from the regular normal corporate activities of the defendants. All of this duplication of effort and expense would be avoided by having the criminal proceeding and this suit tried in the same court. It would not be in the interests of justice to have the criminal proceeding tried in Chicago and this equity suit tried in Los

Angeles, and the two actions should be tried in the same court" (R. 160).

11. No substantial hardship will be borne by the Government if the trial is held in Chicago (R. 159).

12. The mere location of the subsidiaries of National, or that subsidiaries of some of the defendants conduct operations in California, is not important. The transportation system in Los Angeles is only one of forty in other cities in which National is interested, and this interest in Los Angeles was acquired only in 1945, more than eight years after the alleged commencement of the concert of action in 1937. The operating subsidiaries, under the pattern of the complaint, are "merely vehicles through which the channeling of petroleum products, tires and other equipment were achieved" (R. 158).

Summary of Argument.

I.

The application of the doctrine of fourum *non conveniens* involves the exercise of a sound judicial discretion upon the basis of the particular facts and there was no abuse of such discretion by the district court.

The district court (Judge Yankwich) was very sensitive to and carefully considered all of the factors upon which the Government relies in arguing that the suit should not have been dismissed. It recognized that a determination of what is in the interest of justice "imported the exercise of discretion which considers both the interests of the defendant and those of society" (R. 95). However, after weighing all of these factors and a careful scrutiny of all the facts, the district court determined that "the facts spell out vexatiousness and oppressiveness" to the defendants (R. 102). The lower court did not, as the

Government's brief would suggest, merely decide that Chicago was a "more convenient" place for trial than California.

The district court carefully considered all of the factual aspects of the litigation relating to California and concluded that these were "unimportant and irrelevant" in view of the "pattern of the complaint" and all the essential criteria (R. 157). National clearly established that a trial in Chicago was more than a mere matter of convenience, but was essential to avoid unnecessary hardship and to insure a full and fair trial. National is not merely one of nine defendants. It is the central or key defendant whose business, growth, and relationships with the supplier defendants are challenged in these proceedings. National's "business and policy situs" is in Chicago. The trial will necessarily involve for the most part National's business, its affairs, its key personnel, and its records, the source of all of which is Chicago. A trial in California "would result in a complete dislocation of its business at the central place of control." Other defendants demonstrated that if the case were tried in Los Angeles a number of their officers would have to journey there, together with masses of records, and there stay for a considerable period of time (R. 16, 119).

The fact that the criminal prosecution had been transferred to Chicago in itself justified the dismissal of the equity suit. In itself this transfer narrows the legal and factual questions presented to this Court. The district court, in dismissing the equity suit, rightly relied heavily upon the accomplished transfer of the criminal proceeding. The criminal case being set for trial in Chicago, to force National and the other defendants to try the equity suit in California would be oppressive.

II.

The doctrine of "forum non conveniens" is an "instrument of justice" which may properly be invoked by a court of equity in an appropriate case. It has been applied to almost every type of litigation and there is no sound reason, as a matter of principle or policy, to exclude this antitrust case from its application.

The doctrine is an expression of the power and duty of a Federal court of equity to decline jurisdiction when the interest of justice requires. This basic power and duty should not be dissipated unless the statute under consideration makes clear that the venue chosen by the plaintiff is obligatory.

The venue provisions of the Anti-Trust laws not only fail to manifest any intent to require the district court to take jurisdiction, if in so doing hardship and vexation is imposed on the defendants, but the provisions and policy of these statutes reinforce the duty of a court of equity to decline jurisdiction if the interest of justice so requires. In a case such as the one here presented, in which the principal defendant is not found and does not transact business in the district in which the action is brought, the ends of justice do not require that it should be brought before the court.

The criminal proceeding was properly transferred and it would be incongruous to hold that it is beyond the flexible powers of a court of equity to decline to take jurisdiction of the companion equity suit. A narrow question is presented and, at least under the present unusual circumstances, a court of equity should not be held to be under a mandate to entertain this equity proceeding.

ARGUMENT.

I.

There was no abuse of discretion by the District Court which, in declining to take jurisdiction of the equity suit, considered all matters of a public and private nature relevant to a fair exercise of discretion.

A.

The doctrine of forum non conveniens is a broad equitable principle to be applied "in the interest of justice."

The broad implications of the doctrine were clearly enunciated by Mr. Justice Brandeis in *Canada Malting Co., Ltd.*, v. *Paterson Steamships, Ltd.*, 285 U. S. 413, in which it was said (pp. 422-23):

> "Obviously, the proposition that a court having jurisdiction must exercise it, is not universally true; else the admiralty court could never decline jurisdiction on the ground that the litigation is between foreigners. Nor is it true of courts administering other systems of our law. Courts of equity and of law also occasionally decline, in the interest of justice, to exercise jurisdiction, where the suit is between aliens or non-residents or where for kindred reasons the litigation can more appropriately be conducted in a foreign tribunal."

In *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549, Mr. Justice Douglas wrote for the Court (p. 554):

> "We mention this phase of the matter to put the rule of *forum non conveniens* in proper perspective. It was designed as an 'instrument of justice'. Maintenance of a suit away from the domicile of the defendant—whether he be a corporation or an individual—might be vexatious or oppressive."

The doctrine has received most extensive application in the State courts.[6] It has been applied with equal force in England.[7]

It has been applied by the Federal courts and this Court to suits in equity (*Rogers* v. *Guaranty Trust Co.*, 288 U. S. 123) and to cases arising in admiralty (*Langnes* v. *Green*, 282 U. S. 531, and *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413). Recent decisions of this Court approved its application to a stockholder's derivative suit in equity (*Koster* v. *Lumbermens Mutual Casualty Co.*, 330 U. S. 518), and even to a common law action for damages (*Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501).

Statutes and principles take meaning from all the enactments forming the whole body of law bearing upon the subject.[8] In determining whether the theory of *forum non conveniens* applies to the particular civil action under consideration, we have the benefit of the most recent definitive recognition of Congress, under Rule 21(b) of the Federal Rules of Criminal Procedure, that, under proper circumstances, the trial court "shall transfer" a criminal indictment under the anti-trust statutes. This rule, approved both by this Court and by Congress, is a clear mandate to the trial courts to place criminal actions under the anti-trust laws in the forum where justice will best be sub-

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(6) *Universal Adjustment Corporation* v. *Midland Bank, Limited*, 281 Mass. 203; *The Great Western Ry. Co. of Canada* v. *Miller*, 19 Mich. 305 (cited by this Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501).

(7) *La Societe du Gaz de Paris* v. *La Societe Anonyme de Navigation* (1926) 28 Sess. Cas. 13 (H L); *Logan* v. *Bank of Scotland* (1906) 1 K. B. 141.

(8) In *United States* v. *Emory*, 314 U. S. 423 Mr. Justice Reed said (p. 434) "A statute is not to be interpreted as though it were a specimen under laboratory control. It takes meaning from other enactments forming the whole body of law bearing upon the subject."

served. As stated by Judge Holtzoff, Secretary of the Advisory Committee (whose views were cited by the District Court (R. 94)), Rule 21(b) "creates a certain degree of equality between prosecution and defense in the choice of place of trial". The history of the rule makes clear that it was intended to apply to anti-trust actions; indeed, that one of its principal purposes was to correct the practice of instituting criminal anti-trust actions in a forum other than that in which the interest of justice would be subserved. It is difficult to find any reason not to apply the policy expressed in Rule 21(b) to civil actions brought under the anti-trust laws. In many, if not most, cases, the Government files companion civil and criminal anti-trust proceedings; these proceedings are founded on the same facts and they are designed to accomplish the same results. The reason for applying the philosophy of Rule 21(b) to this action is accentuated by the fact that under the stipulation filed by the defendants with the District Court this suit could have immediately been filed in Chicago, so that the result of the dismissal would have been merely a transfer to Chicago.

The growing trend to give wide scope to the doctrine is also reflected by HR 3214, adopted during the present session of Congress by the House of Representatives and now pending before the Senate, which allows the District Court "for the convenience of parties and witnesses in the interest of justice" to transfer any civil action to any other district where it might have been brought.[9] This Bill would clarify

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[9] H. R. 3214 entitled "A bill to revise, codify, and enact into law Title 28 of the United States Code entitled "Judicial Code and Judiciary" which provides (§140 4a Change of Venue) "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This bill was the culmination of four years of effort by the House Judiciary Committee (and its predecessor, the Committee on Revi-

the principle that the District Court has the same duty in *all* civil actions, as it now has in criminal actions, to transfer the case to another district if the interest of justice requires. By authorizing the transfer of a civil action, in lieu of a dismissal, this bill would accomplish the same result as is now achieved by the equitable doctrine of *forum non conveniens*.

B.

The District Court's discretion was properly exercised in the light of all the circumstances, which included the hardship and vexatiousness of a trial in California, involving the history of National whose "business *situs*" is in Chicago, the prior transfer of the companion criminal action, and the continuing control of National prayed for in the complaint.

This Court stated in the *Gulf Oil* case (p. 508): "The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses." There can be no delusive exactness in applying the doctrine. As stated by this Court in *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549, 557. "Each case turns on its facts." However,

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sion of Laws) who sought and obtained the advice and assistance of the late Chief Justice Stone of this Court and two of his associates, a committee of judges appointed by the Judicial Conference, representative of the Attorney General's office, and others. The bill passed the House by a vote of 342 to 23 (93 Cong. Rec. No. 128, pp. 8550-8559).

The Committee Report states (Appendix, Reviser's Notes—p. A132): "Subsection (a) was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is proper. As an example of the need of such a provision, see *Baltimore & Ohio R. R. Co.* v. *Kepner* 1941, 62 S. Ct. 6, 314 U. S. 44, 86 L. Ed. 28, which was prosecuted under the Federal Employer's Liability Act New York, although the accident occurred and the employee resided in Ohio. The new subsection requires the court to determine that the transfer is necessary for convenience of the parties and witnesses, and further, that it is in the interest of justice to do so."

there is no basis for any fear that trial courts will be zealous in refusing to take jurisdiction. In at least three very recent cases,[10] three District Courts decided, as a matter of discretion, that the particular facts did not warrant the application of the doctrine. The *Gulf Oil* and *Koster* cases presented unusual situations, as does the present case; in those cases the District Court in its discretion refused to take jurisdiction and the exercise of this discretion was not interfered with by this Court.

This Court has consistently held that where the District Court exercised its discretion under the doctrine of *forum non conveniens* the exercise of such discretion will not be disturbed unless abused. (See *Charter Shipping Co.* v. *Bowring*, 281 U. S. 515, 517; and *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.* 285 U. S. 413, 418). In *Stroud* v. *United States*, 251 U. S. 15, this Court in refusing to disturb the action of the trial judge in a criminal case in denying a motion to change the venue and to quash the panel of prospective jurors on the ground of local prejudice said (p. 20): "Matters of this sort are addressed to the discretion of the trial judge, and we find nothing in the record to amount to abuse of discretion such as would authorize an appellate court to interfere with the judgment."

The Government did not find itself able to urge that the lower court was guilty of an abuse of discretion. Instead,

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(10) In *Fifth and Walnut Inc.* v. *Loew's, Inc.* (Civil No. 36-736, S. D. N. Y.), decided January 23, 1948, an action for damages under the antitrust laws, and in *Securities and Exchange Comm.* v. *Werner* (Civil Action No. 6774, W. D. Pa.) decided January 21, 1948, an action by the SEC under the Securities Act of 1933 to enjoin fraudulent representations in the sale of securities, the District Courts, while questioning their power, decided that as a matter of discretion the particular facts did not warrant the application of the doctrine. In *United States* v. *Phillips Screw Co.* (Civil Action No. 47-C-147, N. D. Ill. October 12, 1947) the court denied a motion to dismiss an anti-trust proceeding.

the most that the Government's brief contends is that the dismissal of the action was wrong because the Government had some substantial reason to choose the Southern District of California as a forum and that no such action should be dismissed unless the Court is "able to conclude that the government clearly abused the discretion in the selection of venue given it by the statute" (Brief, p. 22). It also enlarges on the fact that the court found "no bad faith" by the Government. We submit that these positions are not valid—the real issue is whether under all of the circumstances there was an abuse of discretion in dismissing the case. The district court could recognize good faith on the part of the Government and still with perfect consistency could, and did, dismiss the action. The question of venue in cases of this nature may not always be easy of decision but any appeal from the lower court's decision must rest upon the question whether the court exceeded the bounds of a reasonable discretion. If it is necessary to show that the Government "clearly abused its discretion" in instituting action in a particular forum, it would be virtually impossible for a defendant to show facts justifying a dismissal. Any such rule would be tantamount to a decision that (even though it is assumed that the statute authorizes a dismissal) the equity court has no power to apply the doctrine.

1. *All the matters relevant to a fair exercise if discretion were taken into consideration by the District Court.*

The court in declining jurisdiction found that the essential issue is an alleged concert of action between National and the suppliers which rests upon a long relationship stemming from Chicago. It found that a trial in California would result in a dislocation of the business of National, Firestone, General Motors, Mack and Phillips (R. 156).

It did not merely determine that Chicago was a "more convenient" place for trial than California. It was influenced by strong and compelling factors showing unnecessary hardship and vexatiousness to the defendants, particularly National.

The court had before it full proof of the hardships which would be visited on the defendants by a trial in Los Angeles. After careful consideration it made detailed findings of fact showing such hardships. We believe it unnecessary further to analyze these findings which have been summarized. Likewise it is unnecessary further to comment on the detail of facts supporting these findings which were set forth in affidavits by officers of three of the defendants and which have been commented upon. The court's findings are well supported by the facts and these findings seem conclusive.

This resulting hardship is not obviated by referring to the fact that defendants in anti-trust actions may often be corporations doing a "multi-state business" (Brief, p. 20). That National is interested in operating companies situated in various states, or that other of the defendants may do business in other states, has no bearing on the question of hardship which would result from a trial in California. While certain types of anti-trust actions may involve alleged restraints which stem from basic activities which are nation-wide in their source and situs,[11] the present proceedings

(11) In *Tivoli Realty, Inc.* v. *Interstate Circuit, Inc., et al.*, (C. C. A. 5th), decided March 18, 1948, suit was brought in Delaware by the owner of a motion picture theatre against fourteen defendants, twelve of whom were the principal producers and distributors of motion pictures and two of whom operated a chain of theatres in Texas, charging that the defendants had a monopolistic position in the exhibition of motion pictures in various cities and denied plaintiff's theatre an opportunity to compete for pictures. Five of the defendants were not in any way subject to jurisdiction in Texas. Two of the defendants, Delaware corporations, filed suit in

are not of that character. The multitude of surrounding facts and circumstances constituting the relationship between National and the suppliers, are shown by the affidavits of defendants to have existed in or to have stemmed from Chicago. The Government's brief in pointing out the wide latitude of proof in these actions states (p. 20): "It (the combination or conspiracy) is rarely embodied in a single instrument and the proof of its existence is drawn from a course of dealing or from communications, memoranda, verbal agreements or written contracts involving the various parties and made or entered

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the District Court of Texas to enjoin the plaintiff from prosecuting the action in Delaware. The circuit court reversed an order granting a temporary injunction since (1) as a matter of comity any application should have been made to the district court in Delaware; (2) in no event was the doctrine applicable since five of the defendants were not even subject to the jurisdiction of the Texas court and there were not two forums available to the plaintiff; (3) suit against the defendants in Delaware, where they were incorporated, could not be regarded as "inconvenient"; and (4) Delaware was more convenient since "the alleged conspiracy is nation-wide and the necessary witnesses, in the main, would have to be brought to Texas from New York which is much closer to Delaware than is Texas". By way of dictum, the Court said at the conclusion of its opinion that the Anti-Trust and Employers' Liability Acts "cannot be distinguished in principle" and mentioned the importance of protecting venue where "a nation-wide conspiracy in restraint of commerce is alleged". The present case is basically different from the *Tivoli* case in that (1) a Federal court in one district does not here attempt to enjoin action in another; (2) all the defendants here are subject to jurisdiction in Chicago; (3) National and all the defendants, other than Federal, are not seeking to transfer the suit from the state of their domicile; and (4) Chicago, unlike Texas in the *Tivoli* case, is plainly the only convenient forum. Moreover, the present alleged restraints pivot essentially about one central defendant and have a source and situs in Chicago, whereas the alleged restraints in the *Tivoli* case were nation-wide in their source and involved for the most part coordinate producers and distributors. As to the dictum with respect to the Antitrust and Employers' Liability Acts, we submit that the Antitrust Laws as a whole and their underlying policy show no intention under any and all circumstances to preclude the application of the doctrine of *forum non conveniens*. The *Kepner* case was decided in the light of the peculiar legislative history and underlying policy there involved.

into at various times." In this case a "course of dealing" for a period of over ten years will be the subject of inquiry and can be adduced only by witnesses living in or about Chicago and documents and papers existing in Chicago.

The Government presents the fact that National has acquired an interest in two companies (Los Angeles and Long Beach) which operate in the Southern District of California; that National paid $12,800,000 for the securities of the Los Angeles Company, and that Standard supplied $1,000,000 to American for this purchase; that at a later date Standard entered into a contract with Los Angeles for a sale to it of its requirements of petroleum products; that National has an interest in Pacific (which owned securities in companies which do business in northern California and two contiguous states) prior to 1940, and that it acquired all of the stock of Pacific in 1946; that in the first eight months of 1946 the Los Angeles and Long Beach Companies purchased more supplies from the suppliers than did National's subsidiaries which it supervised from Chicago; and that it intends to subpoena a number of witnesses from the west coast at the trial (Brief, p. 9).

None of the local companies, upon the ownership of which the Government enlarges, are defendants. The facts respecting them presented by the Government do not meet the facts upon which the defendants based their motion. National's interest in companies located in the Southern District of California may give the court jurisdiction, but neither that interest, nor the interest in other companies operating on the Pacific coast, nor the purchase of supplies by these companies, represent any of the material part of the facts which will be adduced at trial by the Government, and surely no part of the involved structure or historical development which must be adduced by the defendants. If

the facts related by the Government be taken as true, the reasons for the dismissal of the action still remain. On the Government's theory, venue in any community in which National has an interest could be defended. The court considered the facts set forth in the opposing affidavit and found that they had no significant bearing, saying that the operating companies "are merely vehicles through which the channeling of petroleum products, tires and other equipment was achieved" (R. 158); that the counter-affidavit "does not deny the facts relating to National and to the other non-resident defendants" (R. 157); and that the emphasis on local operations "does not conform to the pattern of the indictment," since the operating companies were "merely vehicles through which the channeling of the petroleum products, tires, and other equipment was achieved" (R. 158).

The Government urges that since the intent of Congress was to obtain an early trial of actions under the anti-trust statutes, and since these motions might result in delay in some cases, the court should not dismiss any action unless there is no substantial basis for the venue selected (Brief, p. 19). We submit that this factor is but one of a number to be considered by the trial court in determining whether, in its sound discretion, to dismiss the action. The district court did consider this as well as other questions, saying that this suit could be refiled in the Northern District of Illinois without any further attack on venue, since the defendants had formally agreed to this (R. 145). Since this case could have been instituted in Chicago immediately upon the dismissal in Los Angeles and since, as found by the court in the most elaborate detail, a trial in Los Angeles would impose great hardship on the defendants, the only justification that remains for urging that the lower court's order be reversed is in order to subserve an alleged con-

venience of the Government on the one hand, while accomplishing a great hardship on the defendants on the other. If the lower court's order is reversed, it may be that the Government will be slightly convenienced but certain it is that there will be a substantial hardship visited upon the defendants.

In any case there would seem to be no great danger of delay by reason of motions of this nature. They are in almost all cases part and parcel of other motions made at the commencement of the action. Here the motion was combined with the motion for a bill of particulars (R. 60). The Government could have had this equity suit at trial in Chicago at the present moment, or surely could have had it set for the fall term if it so desired, just as the criminal case is there set for trial in the fall.

The Government challenges the findings of the court as to the convenience of the defendants. It first says that none but National made any serious showing in support of a trial of the cause in Chicago (Brief, p. 26). We respectfully submit that this is not entirely accurate. Firestone filed an affidavit saying that the papers subpoenaed from Firestone disclosed the names of sixteen members of the Firestone organization, all but one of which are residents of Akron or Chicago and that it is possible that each of these persons might be called as a witness (R. 119). Mack also filed an affidavit stating that its records are maintained at its New York office and that to carry on a proper defense in Los Angeles would put it at a serious disadvantage and work a substantial injustice (R. 16). It must be stressed that all defendants joined in the motion. Therefore, the mere fact that other companies, such as General Motors, which has its principal place of business in Detroit, and Phillips, which has its principal place of busness in Bartlesville, Oklahoma, did not file affidavits alleging hardship or

inconvenience, which would be more or less repetitious, cannot support a conclusion that they would fail to be seriously inconvenienced and oppressed by a trial in Los Angeles. Moreover, the Court found as to all defendants, including Standard and Federal, that it is essential that "this case be tried at a location where the evidence to refute this alleged conspiracy may be produced with the least diminution or impairment, which place is at Chicago, Illinois" (R. 157).

The Government also attempts to belittle the effort which must be put forth and the hardship which would be suffered by the defendants if the case were tried in Los Angeles. The affidavits of the defendants reflected the fact that the number of witnesses might reach to 100, that they would come largely from the Chicago area, and that the case would take a long time to try. Irrespective of any speculation as to the exact length of the trial or the exact number of witnesses who would be called, the fact still remains that it would be a long trial, requiring a great mass of documents and records and the testimony of a large number of witnesses, that these documents and records would have to be brought from Chicago, and that these witnesses would have to journey from Chicago and stay in California.

The idea advanced by the Government that the calling of witnesses can be avoided by deposition and that interrogatories or requests for admission can be used by the defendants is a severe oversimplification of the situation (Brief, p. 27). The defendants are entitled to their day in court, and in order to get this and to get a fair trial, it will be necessary for them to have available many witnesses, including their executive officers, and to introduce many exhibits. Proof in a case of this kind cannot rest on mere depositions or interrogatories.

All of the points urged by the Government—the ownership of an interest in some local companies by National; the purchase of supplies by these companies; the desirability of assuring prompt adjudication of civil proceedings under the anti-trust laws; that the defendants do business in more than one state and that hence the choice of the proper forum presents some difficulty; and that there is a "public interest" in suits of this nature were carefully considered by the district court and were fully covered by its findings of fact and its opinion. With full consciousness of the weight of these arguments, the court found that although a court should be more disposed to withhold relief than when dealing with private interests (R. 143), and although the court should aim "to balance societal and individual interests and to maintain the proper equilibrium between private rights and public weal" (R. 144), this case should be dismissed without prejudice to the right to refile it in another district.

2. *The prior transfer of the criminal proceeding in itself justified the dismissal of the equity suit so that it might be tried in Chicago.*

The Government urges that if any inconvenience results from the transfer of the criminal case to Chicago, while the equity suit is tried in Los Angeles, the defendants have brought it upon themselves. Defendants were entitled to the protection of Rule 21(b) and the factual showing which they made induced the Court to transfer the criminal prosecution "in the interest of justice". The defendants should not be penalized or prejudiced because of the favor accorded to their application in the criminal proceeding. The Government's contention would require defendants to forego the protection of Rule 21(b) and make it a "dead letter".

A most vexatious situation would result if the equity suit is to remain before the court in California while the criminal proceeding is pending in Chicago. Apart from the hardships to the defendants, this court in the *Gulf Oil* case recognized (p. 508) that "Factors of public interest also have a place in applying the doctrine". The Government refers (Brief, p. 23) to the desirability of avoiding a congestion in the calendar of the Federal courts in large metropolitan centers in the interest of the "convenience and efficiency" of the courts. What more striking instances of "court inefficiency" could there be than having the two companion proceedings determined in two far removed places with the burden on two separate judges, far removed, to familiarize themselves with all the aspects of the proceedings? The "convenience and efficiency" of the courts should require that the Federal Court in Chicago, where the criminal proceeding is pending as an accomplished fact (to be tried October 11, 1948), deal with the equity suit. Any possible impediment to the power of the Chicago court to deal with the equity suit has been removed by the stipulation filed by defendants with the district court in California acknowledging the appropriateness of a trial in Chicago (R. 132).

Separate proceedings before the Chicago and California courts would beget a host of difficulties and hardships and be vexatious to the defendants. There would be an inevitable duplication in the burdens of trial, time of parties and witnesses, time and efforts of counsel, and expenses. A trial of the equity suit in Chicago would seem to subserve the convenience of the Government itself. The Government in a cavalier fashion dismisses the real hardships to the defendants from separate proceedings in far removed places by saying that a conviction in the criminal proceeding would leave only the question of relief to be tried in the

equity suit (Brief, p. 31): These defendants firmly deny that there has been any violation of law, criminal or civil; are they to infer that the equity suit will be abandoned in the event that the alleged restraints are not established in the criminal case? On the other hand, the equity suit seeks the widest conceivable relief and it will involve substantially all of the matters presented in the criminal suit. Again, the defendants are unable to take seriously the suggestion that if in the quity case the defendants are successful, there will be a plea of nolo contendere in the criminal action. All of this is an easy evasion of the fact that the criminal case was properly transferred and it is now sought to try the same case on the civil side on the west coast while the criminal action will be tried in the middle west.

3. *The prayer for continuing control of National was a compelling reason to dismiss the equity suit.*

After commenting on the sweeping relief requested in the equity suit the district court found that the detailed and continuing supervision of National, prayed for in the complaint, could much more efficiently be handled in Chicago (R. 158). This factor was very properly considered by the lower court.[12]

The Government seeks to belittle the continued supervision of National by the court which will be necessary if

(12) While Mr. Justice Black dissented in *Koster* v. *Lumbermen's Mutual Casualty Company*, 330 U. S. 518 (a derivative suit by a policyholder of an insurance company for breach of trust and an accounting), he recognized with respect to such a case as the present (p. 532): "There may be rare instances in which a Federal Court could decline to provide an equitable remedy against multistate corporate defendants. A prayer for relief which requires * * * *the detailed and continuing supervision of the affairs of a defendant corporation whose headquarters is beyond the jurisdiction of the court would in my view constitute such a situation.*" (Emphasis supplied.)

the Government succeeds (Brief, p. 29). We believe that the prayer of the complaint itself establishes the detailed and lengthy supervision which would be necessary. The following relief is asked (R. 8).

That the suppliers be required to dispose of their stock interest in National. The suppliers own a substantial amount of preferred stock of National and some of its common stock. The disposal of such stock holdings will require a major financial operation requiring negotiations and doubtless a public offering of securities. This will take a long period of time, with recourse to the court from time to time.

That the agreements between National and the suppliers for the purchase of supplies be declared void. In this connection, both National and the public will need protection from the court. The ability of the operating companies to purchase certain supplies, particularly petroleum products, is severally limited. In order that the operating companies may render adequate service to the public, it is important that they have the sources of essential products and supplies. If the supply contracts are to be declared void, this subject may well require attention, over a period of time, from the court supervising any such decree.

That the operating companies be enjoined from purchasing equipment except upon competitive bids under "a plan to be made a part of any final order". This is a complicated subject. A variety of type and kind of motor vehicle and streetcar is used by the operating companies. Different kinds of service demand different kinds of vehicles, and different kinds of vehicles require different kinds of petroleum supplies or power and different kinds of tires and equipment. Communities change and service must change. This might well require the supervision of the court over a long period of time.

That National be required to dispose of its interests in certain operating companies. There are 42 of these operating companies throughout the United States. The investment market for securities of city transit companies is badly disrupted and is, at best, always limited. In order to dispose of any material part of these securities long periods of negotiation will be necessary, and it would seem that National would have to go back to the court on many occasions.

That National be enjoined from acquiring local transportation interests without the consent of the court. In order to obtain such consent, it would seem that National might have to demonstrate to the court its own competitive situation and the nature of the proposed interest. This would make necessary that National go to the court on every occasion.

In short, if the Government were to obtain a decree in this case bearing any resemblance to that which it demands, National, and its executive officers, would have to establish themselves in California in order to be able to go to the court from time to time for supervision and direction.

II.

It was not beyond the power of the District Court, which had transferred the trial of the companion criminal proceeding "in the interest of justice", to decline jurisdiction of the civil anti-trust proceeding.

A.

The mere presence of some special venue provision does not preclude the application of the doctrine.

As pointed out by the District Court in its opinion, there is nothing unusual about a "special venue provision." Congress in respect to a great number of subjects has legis-

lated that actions might be brought in a forum in which they could not be brought but for such legislation (R. 138). Illustrative are: actions relating to copyrights (17 U. S. C. 35); patent infringements (28 U. S. C. 109); actions for the recovery of taxes under the Internal Revenue Act (28 U. S. C. 195); and stockholders' derivative suits (28 U. S. C. 112 (a)). The only legislation which has been construed by this Court to bar the application of the doctrine is the Federal Employers' Liability Act (45 U. S. C. 56), so construed in *Baltimore & Ohio R. Co.* v. *Kepner*, 314 U. S. 44, and *Miles* v. *Illinois Central R. Co.*, 315 U. S. 698. The *Kepner* and *Miles* cases rest upon the peculiar legislative history of the Federal Employers' Liability Act and their rationale is wholly foreign to the present case.

In the *Kepner* case a railroad brought suit in the Ohio court to enjoin a resident of Ohio from prosecuting a claim under the Federal Employers' Liability Act in the Eastern District of New York. Originally the venue of actions under the Federal Employers' Liability Act was left to the general statute (Judicial Code, Sec. 51, 28 U. S. C. 121) which then fixed venue in districts in which the defendant was an inhabitant, but, as stated by Mr. Justice Reed in his opinion in the *Kepner* case (p. 49), "Litigation promptly disclosed what Congress considered deficiencies in such a limitation of the right of railroad employees to bring personal injury actions". As a result, Section 6 of the statute was amended to allow the injured employee to sue in "either the district where the defendant resided, or in which the cause of action arose, or in which the defendant was doing business at the time the action was commenced"; to give the state courts concurrent jurisdiction; and to provide that no case brought in a state court "shall be removed to any court of the United

States" (45 U. S. C. 56). A majority of the Court (Chief Justice Stone and Justices Frankfurter and Roberts dissenting)[13] determined in the *Kepner* case that the state court could not enjoin suit in a distant Federal court since there was a legislative intention to create a "right of action" not to be "frustrated for reasons of convenience or expense". A majority of the Court in the *Miles* case (Chief Justice Stone; Justices Frankfurter, Roberts and Byrnes dissenting) decided that the State Court in Tennessee could not enjoin the further prosecution of a suit in the State Court of Missouri. The Court relied upon the legislative history including the provision of Section 6 prohibiting the removal of a suit properly instituted in a State Court.

The limitation of the *Kepner* case is succintly phrased in a concurring opinion by Mr. Justice Jackson in the *Miles* case[14] (315 U. S. 698, 706, 707):

> "Realistically considered, the issue is earthy and unprincipled. So viewed, the real issue is whether a plaintiff with a cause of action under the Federal Employers' Liability Act may go shopping for a

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(13) Mr. Justice Frankfurter noted that the majority opinion did not "question the familiar doctrine of *forum non conveniens* under which a court having statutory jurisdiction may decline its facilities to a suit that in justice should be tried elsewhere" and concluded (pp. 57, 58):

> "Nothing in the history of the 1910 amendment indicates that its framers contemplated any such vast transformation in the established relationship between federal and state courts and in the duty of the federal courts to decline jurisdiction 'in the interest of justice'."
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> "The declaration by Congress that a court has jurisdiction and venue is not a command that it must exercise its authority in such a case to the unnecessary injury of a defendant and the public. The doctrine has been consistently followed in a series of unanimous decisions."

(14) Since there were four dissents, this concurring opinion of Mr. Justice Jackson was necessary to the majority opinion.

judge or a jury believed to be more favorable than he would find in his home forum."

* * * * * * *

Such being the major burden under which the workmen and the industry must function, I see no reason to believe that Congress could not have intended the relatively minor additional burden to interstate commerce from loading the dice a little in favor of the workman in the matter of venue. It seems more probable that Congress intended to give the disadvantaged workman some leverage in the choice of venue, than that it intended to leave him in a position where the railroad could force him to try one lawsuit at home to find out whether he would be allowed to try his principle lawsuit elsewhere."

Thus, the *Kepner* and *Miles* decisions were merely a recognition of the legislative purpose to allow an injured employee "to shop for a favorable forum", the intent being "to load the dice a little in favor of the workman in the matter of venue". In construing the majority opinion in the *Kepner* case the Court below said: "Only when the legislative history shows an intent to confer a right so absolute as to exclude any interference on the part of courts are we justified in failing to give effect to this doctrine" (R. 205).

The argument that any type of "special venue provision" manifests a policy to render inapplicable the broad equitable doctrine of *forum non conveniens* is unconvincing. It reflects a strange desire for certainty in dealing with the plastic and flexible powers of a court of equity. A special venue provision as such is merely an enlargement of the permissive forums in which suit might be brought. Section 51 limiting suit to the residence of plaintiff or defendant might be so rigid as to prevent a trial in the

only convenient forum; or possibly in any forum. However, the relaxation of the requirements of Section 51 and the authorization of some other forum in an appropriate case should not put a defendant at the mercy of a plaintiff and deprive him of the benefits of the equitable doctrine unless, of course, there is a clear legislative mandate that the plaintiff's choice of venue should not be interfered with. The District Court properly construed the *Kepner* case to say: "Not that *any* special venue act excluded the application of the doctrine of inappropriate forum, but that the particular special venue statute under consideration, in the light of its history, excluded the application of the doctrine" (R. 140).

The *Koster* case, recently decided by this Court, itself involved a stockholders' derivative suit brought under a special venue statute which was added to Section 51 of the Judicial Code and provided "except that suit by a stockholder on behalf of a corporation may be brought in any district in which suit against the defendant or defendants in said stockholders' action, other than said corporation, might have been brought by such corporation and process in such cases may be served upon such corporation in any district wherein such corporation resides or may be found". The effect of this amendment was to allow the corporation, provided it resided or was found in the district, to be sued in any district in which suit might have been brought against the other defendants. No member of the court considered that this special venue provision deprived the trial court of its inherent power, which it exercised, to decline jurisdiction. The Government's statement (brief, p. 33) that the statute involved in the *Koster* case "is not a special venue statute within the meaning of the distinction drawn in the *Gulf Oil* case" is itself a recognition that the doctrine

of *forum non conveniens* must apply to some special venue statutes.

In *Urquhart* v. *American-LaFrance Foamite Corporation*, 144 F. 2d 542 (U. S. Ct. App., D. Col.), cert. den. 323 U. S. 783, the Circuit Court of Appeals held that the doctrine was applicable to a suit for patent infringement notwithstanding that it was brought under a statute with special venue provisions allowing suit to be brought in the district where the defendant has committed acts of infringement and has a regular and established place of business (Title 28, U. S. C. A., Sec. 109). While the District Court dismissed the complaint on the ground that the defendant did not have a regular and established place of business in the district, the Circuit Court found the defendant did have such a place of business but remanded the case to the district court "to determine whether it should retain jurisdiction over this case applying the principle of *forum non conveniens.*"

B.

The venue provisions of the anti-trust laws, especially Section 5 of the Sherman Act and Rule 21(b) of the Federal Rules of Criminal Procedure, not only fail to manifest any intent to require the District Court to take jurisdiction but accentuate the duty of a Court of Equity to decline to take jurisdiction if in a proper case, as here, the interest of justice requires.

The present suit has been brought under Section 12 of the Clayton Act authorizing suit where the corporation is an inhabitant or "where it may be found or transacts business". While there are nine corporate defendants, the complaint alleges that only General Motors and Standard transact business and are found within the district (R. 1).

Rule 21(b) manifests an intent to vest the courts with control over the forum of an antitrust proceeding. It is

no answer to say that there is no literal counterpart in equity practice of Rule 21(b). It is an essential and integral part of the anti-trust laws. This same intent is manifested by the action of the House of Representatives in passing the Bill (HR 3214) granting authority to a district court to transfer any civil action to another district if this transfer is in the interest of justice and the convenience of the parties *(supra,* footnote 9).

All of the defendants, other than General Motors and Standard, are amenable to process, if at all, only by virtue of Section 5 of the Sherman Act which provides that "whenever it shall appear to the court before which any proceeding under Section 4 of this Title may be pending, that the *ends of justice* require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not". (Emphasis supplied.)

Irrespective of what inferences might otherwise have been drawn from Section 12, Section 5 sanctions the power of the court to decline jurisdiction on the application of defendants who are not found or who do not do business in the district. The provision of Section 5 authorizing the court to bring in other parties "whenever it shall appear to the court * * * that the ends of justice require" is plainly inconsistent with any intention by Congress that the Government's choice of forum is absolute. There is a striking similarity between the language of Section 5 authorizing a party as National (which is not an "inhabitant" or "found" or "transacting business") to be made a party only when "it shall appear to the court * * * that the ends of justice require" and Rule 21(b) of the Criminal Rules requiring a transfer "in the interest of justice". The effect and impact of statutory provisions upon the

broad principles which guide and control the action of a court of equity is not static or immutable, and Section 5 must now be deemed, in view of the development of the entire body of law dealing with anti-trust proceedings, to vest a court of equity with the discretionary power to decline jurisdiction. Unless there are most compelling reasons to the contrary, the powers of a court of equity are not to be so straight-jacketed.

We respectfully represent that Congress did not intend that Section 5 of the Clayton Act should be used to impose hardships of the nature of those which would be visited upon the defendants in this case. Here we have an action commenced in Los Angeles in which primary jurisdiction was claimed over two defendants (General Motors and Standard, R. 1) neither of which, although substantial in size, is the principal defendant in the action. This principal defendant is admittedly National. The Government does not, in reality, deny the hardships which would be placed upon National and the other defendants by a trial in Los Angeles. Under these circumstances we respectively represent that "the ends of justice" do not require that National be brought into the suit in Los Angeles.

There is nothing in the legislative history or consideration of Section 12 of the Clayton Act to require this court to hold that the Federal courts may not under any circumstances decline jurisdiction in the interest of justice. On the contrary, the "Congressional history" clearly manifests an intention to protect a party from vexatious litigation in a particular forum.[15]

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(15) When the Clayton Act was pending in Congress, an attempt was made to amend Sections 4 and 12 so as to allow the commencement of civil anti-trust actions against a corporation in any district where the corporation "had an agent". However, the proposed amendments met with considerable opposition because of the great vexatiousness and inconvenience it might cause corpora-

There is no basis for urging that Congress intended to allow the government to shop around for what it may consider the most favorable forum, regardless of the vexatiousness and oppression to the defendants. Surely, the Government is not at a disadvantage, with respect to the forum for the prosecution of any anti-trust action, and

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tions located and doing business in far removed localities. In adversely commenting on the proposed amendment to Section 4 Representative Scott stated (Cong. Rec. Vol. 51, Part 10, p. 9467):

> "It would not include any agent. The amendment enlarges the present interpretation of the word 'found' as applied to the corporate jurisdiction, and permits suit to be brought, with absolute discretion on the part of the plaintiff, in any district in which the defendant may have an agent, without defining the character of that agent.
>
> "Now, we all know that there is an almost infinite number of characters of agents. Corporations transacting interstate business have agents, we may say, in practically every state of the Union for some purpose. Surely it can not be possible that the gentleman would attempt to confer jurisdiction and venue upon the Federal Court in every district in the United States where any agent can be found, regardless of the question whether the corporation is domiciled in that State or district, or whether it is doing business there."

The amendment to Section 4 which applies to treble damage actions by private litigants was adopted by Congress but the amendment to Section 12 was dropped. Section 12 as finally passed by Congress applies only to corporations residing, or transacting business, or which may be found in the district, and National, the hub of this entire alleged conspiracy and the principal defendant in this action, neither resides, nor transacts business, nor can it be found in the Southern District of California.

During discussions on the House Floor, an amendment was also offered containing the same venue provision as is contained in the F. E. L. A.—giving state courts concurrent jurisdiction and denying a right of removal to Federal Courts. Rep. Cullop, who offered the amendment, argued that plaintiffs were required to travel great distances to bring suit and the amendment would allow them to sue in their home districts. This amendment was rejected. Cong. Rec. Vol. 51, Part 10, pp. 9662-9664. The rejection of the very provision that has been used to support the conclusion that Congress intended plaintiffs to have an absolute choice of forum in F. E. L. A. cases (*Miles* v. *Illinois C. R. Co.*, 315 U. S. 698, 702), establishes that the venue provisions in the Clayton Act were not intended to give plaintiffs any such absolute choice of forum.

there is no reason, if we may again refer to the language of Mr. Justice Jackson, "to load the dice" in its favor with respect to the place of suit. Since the criminal proceeding has been transferred under Rule 21(b) it would be incongruous if it were held to be beyond the power of a court of equity to decline to take jurisdiction over a civil proceeding.

To hold that a court of equity has no power to dismiss an equity proceeding, when a companion criminal prosecution has been properly transferred under Rule 21(b), would largely defeat the purpose of the Criminal Rule. Such a holding would deprive litigants of the practical advantages of the rule. The court has, in reality, a narrow question to determine—whether, when a criminal prosecution on the same facts is pending in another district, a Federal district court, sitting as a court of equity, has power to dismiss a sister civil suit brought under the anti-trust laws, to the end that it may be brought in the district in which the criminal prosecution is pending. We submit that there is nothing in the statutes to deny, and that every equitable and practical reason justifies, the existence of this power by the district court.

Conclusion.

The judgment of the District Court should be affirmed.

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